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Supreme Court of the United States

October Term, 1961

No. ..588

WORTH PETTIT, JR.,

Petitioner.

AGAINST

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
The Opinion Below	2
The Grounds of Jurisdiction	2
Statutes Involved	2
Questions for Review	2
Statement of the Case	3
Reasons for Granting the Writ	13
Conclusion	14

Cases Cited

Kotteakos v. United States, 328 U. S. 750 (1946)	3, 13
Marshall v. United States, 360 U. S. 310 (1959)	2, 13
Schaffer v. U. S., 266 F. 2d 435; 362 U. S. 511	3, 13
United States v. Krulewitch, 145 F. 2d 76	3, 13

Statutes Cited

Title 18, U. S. C.:	
Section 1342, 3	1, 2
Section 1341	1, 2
Section 371	2
Title 15, U. S. C.:	
Sections 77e(a)(1), (2)	2
Section 77x	2

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner[1] respectfully asks this Court to issue a writ of certiorari to review the final judgment of the Court of Appeals for the Second Circuit which affirmed petitioner's conviction under Title 18, United States Code, Sections 1342 and 3; Title 18, United States Code, Sections 1341

[1] Three defendants are petitioning this Court in this case for writs of certiorari. There is no community of interest between them, and yet their interests are not necessarily in conflict. They have joined together to pay certain printing expenses common to all of them. They respectfully request this Court to consider the arguments and presentation of each as though made by all wherever and whenever applicable.

and 2; Title 15, United States Code, Sections 77e (a) (1), (a) (2) and 77x; and Title 18, United States Code, Section 371.

The Opinion Below

The Opinion of the Court of Appeals is reported at 274 F. 2d 928. A copy is annexed to the petition of Leo B. Mittelman for a similar writ submitted simultaneously herewith, and we respectfully refer this Court to his petition.

The Grounds of Jurisdiction

The grounds are the same as appear in Petitioner Mittelman's application to which this Court is respectfully referred.

Statutes Involved

The statutes involved are set forth in the petition of Leo B. Mittelman to which this Court is respectfully referred.

Questions for Review

1. Whether the failure of the Trial Court to grant a mistrial because of McCarthy's plea of guilty, or the failure of the Trial Court to hold a hearing on that question when evidence was presented to it, that the jury had disobeyed the Court's instructions in connection therewith, constituted reversible error. *Marshall* v. *U. S.*, 360 U. S. 310 (1959).

2. Whether the admission of evidence as to Worth Investment Company constituted reversible error. *U. S. v. Kralowitch*, 145 F. 2d 76.

3. Whether there was a fatal variance between the pleading and the proof, and or the proof and the indictment. *Kotteakos v. U. S.*, 328 U. S. 750 (1946).

4. Whether the receipt in evidence of the Crosby-Jannis letter (ex. 60-A) by the Trial Court without correctly and consistently instructing the jury that it was not competent evidence against petitioner, was reversible error.

5. Whether the reversal of the convictions of the broker defendants and a dismissal of the indictment against them requires reversal of petitioner's conviction and a new trial (*Schaffer v. U. S.*, 266 F. 2d 435; 362 U. S. 511).

Statement of the Case

The indictment is in 50 counts. Said counts are detailed in the Mittelman petition to this Court, and this Court is respectfully referred to his statement in that regard. Petitioner was named as a defendant in all of said counts.

Judgment of conviction was rendered against petitioner on June 11, 1960 based on a jury verdict adjudging him guilty on 24 counts and innocent on 13 counts. He was convicted on Count 1 (charging the use of wire communications in furtherance of a scheme to defraud); Counts 2, 4, 5, 6, 7 and 9 through 22 (charging mail fraud); Counts 39, 40 and 43 (substantive violations of the Securities Act of 1933) and Count 50 (charging a conspiracy to sell unregistered securities by use of the mails). The Trial Court dismissed 13 counts.

Petitioner was sentenced to three years imprisonment and was placed on probation for an additional three year period. Petitioner was admitted to bail by the Trial Court, and his bail is still in effect.

Petitioner was tried with nine other individual defendants and two corporations. In addition, nineteen other persons were named as co-conspirators in Count 50, but were not indicted. The trial lasted almost four months. The transcript covers 9,000 pages. The Trial Court's charge consumed an entire day, and was delivered at the rate of 125 words per minute and purported to cover all applicable rules of law, and the marshalling of the facts.

The prosecutor's opening was intemperate and garbled and promised proof as to petitioner which was never realized, but the mere statement of which was extremely prejudicial.

The Trial Court ruled early in the case that all proof offered by the Government to which there was objection would be received subject to connection. The stage was thus set for the smearing of all defendants by all the proof regardless of relevancy or applicability. The Government was not required at any time to indicate against which of the defendants proof was being offered. The large number of defendants and co-conspirators, the length of the trial, the complexity of the issues and of the exhibits, nine defense lawyers, two prosecuting attorneys, a half dozen or more special governmental agents, all contributed to an atmosphere of confusion and tension, making a fair trial impossible.

At the conclusion of the Government's case the Trial Court commented to the jury as follows:

> "I will not let this case go to the jury in any such confused state, M. Lankenau, that is all there is to it: you line it up. The mere fact that twelve

> defense attorneys sit here and not one of them can point out the failure of proof in this number of Counts, I think is a pretty good indication of the fact how obscure this proof has been" (T. 6875).

Comment

Counts 2 and 50 of the indictment have their inception dates on March 18, 1955. It is to be noted that petitioner did not meet any of the defendants involved herein until sometime in September 1955, when he first met McCarthy. Obviously petitioner had nothing whatever to do with the matters which came into the case between March 18 and September of 1955. The filling-in of that gap in time, and the incidental and collateral evidence which it sucked into it, consumed almost half the time of the trial, and was loaded with highly prejudicial evidence, more frequently than not irrelevant to the issues.

Petitioner was for some years prior to September, 1955, Vice-President of the Prudential Federal Savings and Loan Association in Salt Lake City, Utah. Before occupying that position he was Executive Vice-President of the Brownsville Federal Savings and Loan Association in Brownsville, Texas (J. 1103a-1104a, J. 1617a).

Petitioner came to New York City in September, 1955 with the intention of entering the mortgage brokerage business. He was accompanied by defendant Meredith, whose acquaintance he had made in 1954 in Utah where Meredith was employed by a mortgage company which did business with petitioner's savings and loan association (J. 1618a).

Petitioner learned after several meetings with New York acquaintances that the mortgage brokerage business was depressed at that time as a result of Government ac-

tion with regard to financing mortgages of veterans, and he found no opportunities in that field (J. 1618a-1619a).

Soon after petitioner learned of this situation, and about September 20, 1955, William J. McCarthy proposed to him that he join with him and defendant Crosby and invest some money in the acquisition of the controlling stock of Texas-Adams Oil Company, Inc. and he agreed to do so (J. 1619a-1620a).

Following the acquisition of Texas-Adams on September 27, 1955, petitioner was elected Vice-President and Chairman of the Board and he continued as such until about March 15, 1956, when he terminated his association with the venture (J. 1152a-1154a).

Although he held those two titles for approximately six months, the record discloses that he exercised no real authority in the affairs of the company and such official duties as he performed were largely ministerial and routine.

Petitioner's connection with the Texas-Adams acquisition by McCarthy and associates began only a very few days before the closing on September 27, 1955 as a result of McCarthy's suggestion that he join the enterprise and put some money into it (J. 1618a-1620a).

As a result of the conversation with McCarthy and the proposal which he made, petitioner, on or about September 26, 1955, requested his bank in Salt Lake City, Utah, to wire $4,000 to the Chemical Bank in New York for his use, and that was done on September 26, 1955. $3,700 of these funds were used on September 27 to accomplish the closing of the Texas-Adams acquisition (J. 241a-242a, J. 253a).

It is conclusively established in this record that petitioner took no part in the negotiations between Philip

Gordon and Company and McCarthy and Crosby, which preceded the September 27th closing (J. 266a).

Likewise, and this is a fact of vital importance to petitioner, he took no part in the negotiations, at any time, between McCarthy and Crosby and the moneylender, Spiotta, which led to the loan of $40,300 by Spiotta. All of Spiotta's discussions and negotiations with regard to Texas-Adams were with McCarthy and Crosby (J. 182a, J. 183a, J. 184a-185a, J. 188a). Spiotta testified at one point, "I say now under oath that I did business only with Mr. Crosby" (J. 209a).

Although petitioner was physically present at the September 27th closing, it is abundantly clear that he took no real part in anything that was being done there, except to contribute $3,700 to the purchase price of the Texas-Adams stock. Several of the Government's witnesses vaguely recalled that petitioner was at the closing, although taking no active part in what was being done, and others either had no recollection of his presence or were unable to identify him (J. 179a, 246a, 258a, 251a-252a, 258a).

During the period from September 27th to November 7, 1955, William J. McCarthy, with the assistance of appellant Crosby, dominated and directed the affairs of Texas-Adams. On or about November 7, 1955 Crosby resigned as an officer and director of Texas-Adams as the result of a disagreement with McCarthy, and thereafter McCarthy and Thomas K. Hudson, a Denver lawyer and director of Texas-Adams, ran the company and made all of the significant decisions as to its affairs.

The record discloses that following the September 27th acquisition, McCarthy was living at the St. Moritz Hotel in New York and in the weeks immediately thereafter he conducted many of the affairs of Texas-Adams from his

suite there. Up to the date of his resignation from the company on November 7, 1955, Crosby lived at the Shoreham Hotel on West 55th Street, New York, and maintained a combined apartment and office there, where he functioned as the Secretary-Treasurer of Texas-Adams. Crosby kept the Texas-Adams files there until November 7th and employed a secretary, one Lynne Crane, who was a Government witness in this case. It was Miss Crane's testimony that during this period she was the only Texas-Adams employee, that petitioner was never at this office in the Shoreham Hotel, and that he never gave her any directions or dictation (J. 874a-875a, J. 879a-880a).

In summary, petitioner, for years a responsible official of savings and loan associations in Texas and in Utah, joined the Texas-Adams venture in September, 1955 at the behest of an acquaintance of many years, William J. McCarthy.

During the succeeding three or four months he participated to a limited extent in legitimate business negotiations in connection with three or four contemplated Texas-Adams acquisitions. McCarthy made all the decisions in these negotiations.

No Government witness testified that petitioner made any false representations to him or defrauded him in any manner. The proof indicates that petitioner drew a salary of $1,000 per month from Texas-Adams for perhaps three or four months beginning in November, 1955. There was no showing by the Government that he reaped any profits from the venture. In fact, Texas-Adams owed him money at the time he terminated his association with it. When he lost confidence in what McCarthy was doing in Texas-Adams, petitioner severed his connection with it about March 15, 1956. In a very real sense, petitioner is perhaps the most aggrieved victim of McCarthy's folly.

After three days of trial defendant McCarthy pleaded guilty in the absence of the jury. The circumstances surrounding this matter is a subject of a question before this Court.

During the course of the trial, the Government under a false claim of surprise was permitted to cross-examine its own witness, and by such improper means adduce indirectly and improperly damaging hearsay evidence of Government agents who were not called to the stand, and could not be subjected to cross-examination with respect to the alleged material contained in the reports from which the prosecutor was reading. This related to the so-called Greenberg episode which, by the way, came into the case solely because of the presence therein of the aforementioned broker-defendants.

During the course of the trial, the Government offered evidence which was received of independent crimes unrelated to the charges contained in the indictment. All this evidence was objected to, and the objections overruled.

During the course of the trial the defense was foreclosed from obtaining statement of witnesses made to the prosecutors before the trial on completely untenable grounds. Indeed, the evidence is clear that though the prosecutors knew of this Court's ruling in the *Jencks* cases, they deliberately destroyed some of the aforementioned statements and deliberately made deletions and interpolations in others so as to avoid production as non verbatim statements of the witnesses.

Particularly damaging to petitioner was the receipt in evidence over objection of a letter concerning transactions between defendant Crosby and one George Jannis without appropriate instructions to the jury specifically that it was not competent evidence against petitioner. The episode requires some further discussion.

There is no evidence in this record that petitioner had anything to do, either directly or indirectly, with any transactions between Crosby and Jannis or that he was ever aware that they were going on or even heard of them prior to the trial of this case.

Nevertheless, the Trial Court, by admitting incompetent evidence and by misconstruing and misstating what the evidence showed with respect to the Crosby-Jannis transactions in its charge to the jury, connected petitioner directly to these transactions without any legal evidence in this record to justify such action. This was, as we shall demonstrate, highly prejudicial error.

The prosecutor, in his opening statement to the jury, named the defendants whom he contended were involved in the Jannis transactions. He made no claim that petitioner was in any way connected with them. Jannis, testifying as a Government witness, gave no testimony pertaining to petitioner or connecting him in any way with the transactions which Jannis had with the appellant Crosby.

After the Court overruled defense objections to the admissibility of the Crosby letter (gov. exh. 60A), the prosecutor requested a conference at the bench, which the Court granted, and he addressed the Court as follows:

> "Your Honor, I ask permission to reserve my right to read this to the jury until the case is drawing to a close, at which time other admissions may be introduced by the Government, and at that time I would ask your Honor, considering all the evidence in the case to make appropriate instructions concerning the effect an instrument such as this and other instruments might have as far as the defendants on whom they are binding" (J. 674a-674aa).

Since the transactions between Jannis and Crosby were now being placed before the jury, counsel for Crosby took the position that all the evidence on the transactions should be introduced in the orderly fashion of presenting it at one time and when the jury could make sense of it. He felt, furthermore, that to allow the Government to withhold the contents of the letter from the jury and to be permitted to read it to the jury later in the case would, in effect, be giving the Government some sort of summation during the course of the trial. The Court, of course, agreed. While the suggested procedure of the prosecutor was not sound and was a trifle bizarre, he did make one valid point during the course of his argument for his procedure: this letter of Crosby was only admissible at the time against Crosby and it would never be admissible against anyone else later, because he could not connect it to any other defendants. The prosecutor's view is on the record:

> "Mr. Lankenau: Your Honor, I cannot make the representation of connection beyond the connection to Mr. Crosby, and that is the reason I thought and meant to make it clear that I considered this by way of an admission of Crosby and not an admission by other defendants. For that reason I suggested to your Honor the procedure I did because I want to be fair to the other defendants whose names are mentioned in the instrument" (J. 674aa-674ab).

But the Court did not recognize the prosecutor's conceded inability to connect the letter to petitioner or anybody except Crosby. The Court went on to tell the jury that at the end of the case it might be able to use the letter against petitioner and other defendants if they found that a conspiracy existed!! Here is the Court's

instruction to the jury following his ruling on the admissibility of the Crosby letter:

> (The following proceedings took place within the hearing of the jury:)
>
> "The Court: Ladies and gentlemen:
>
> This exhibit 60-A which has just been identified as having been signed by Peter Crosby is being received in evidence at this time only as against the defendant Crosby.
>
> There are other defendants mentioned in that exhibit, but at this time I direct you to disregard it as to those other defendants. Later on if they are proved to be connected with the conspiracy in such a way that the acts of one bind all who are members of it, then you can consider it as evidence against not only those that are mentioned but anyone else who has been proved to have been in the conspiracy (J. 674ab).
>
> • • • • •
>
> The Court: Go ahead, Mr. Lankenau" (J. 674ac).

The Assistant United States Attorney then read Exhibit 60A to the jury.

Does anyone now take seriously the alleged effectiveness of instructions to a jury in conspiracy cases?

To save the time of the Court, and the expense of a lengthy petition and brief, petitioner respectfully requests this Court to read the petitions of petitioners Mittelman and Meredith submitted herewith as though presented by him for consideration, and incorporates herein all applicable material.

Petitioner trusts that this Honorable Court will excuse this imposition upon it. It has perhaps not gone un-

noticed that the trial was lengthy and the proceedings extremely costly.

Reasons for Granting the Writ

1. In sustaining the trial Court with respect to the plea of guilty of defendant William J. McCarthy on the third day of a 4 months trial, and its failure to grant a mistrial, and its further failure to hold a post verdict hearing with respect to jury misconduct in reading newspaper reports about the plea and discussing it, despite instructions not to read newspapers, listen to the radio and not to discuss the case, the court below decided the matter in conflict with prior decisions of this Court, particularly, *Marshall* v. *U. S.*, 360 U. S. 310 (1959).

2. In sustaining the trial Court with respect to the admission of evidence of unrelated crimes, the Court below decided a matter in conflict with the rule approved by this Court in the *U. S.* v. *Krulewitch*, 145 F. 2d 76.

The Court below decided an important question of criminal law in conflict with the decision of this Court in *Kotteakos* v. *U. S.*, 328 U. S. 750 (1946).

4. In reversing the conviction of the three broker defendants and acquitting them, the Court below failed to order a new trial despite the fact that the record clearly indicated that prejudicial evidence was received against all the defendants, which would have been inadmissible but for the fact that the broker defendants were named as co-conspirators. We believe that this case bears resemblance to *Schaffer* v. *U. S.*, 266 F. 2d 435; 362 U. S. 511, recently decided by this Court. We believe it to be a matter of first instance of great importance which ought to be decided by this Court. And we believe that if the

rationale of the Schaffer decisions in this Court and in the Court below are applied, this Court will order a new trial for the petitioning defendants.

Taken all together, we submit that the matters mentioned above justify the granting of a new trial.

CONCLUSION

It is respectfully submitted that this Court should issue the writ prayed for.

Respectfully submitted,

FREDERICK W. SCHOLEM
Attorney for Petitioner.